

**A Tneu Seng Bee & Ors v Lumayan Plantation Sdn Bhd
& Ors and another appeal**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS W-02-5 OF 1994 AND W-02-27 OF 1994

NH CHAN, ABDUL MALEK AHMAD AND AHMAD FAIRUZ JICA

B 11 NOVEMBER 1998

Civil Procedure — Appeal — Fact, findings of — Trial court's finding of fact — Findings supported by evidence — Appellate court should not disturb findings unless evidence lacking — Whether trial judge was wrong in her findings

C *Companies and Corporations — Shares — Ownership of shares — Second appellant claimed he provided purchase monies for shares of respondents — Second appellant put shares in brothers' names to avoid paying income tax — Whether respondents held shares on trust for second appellant — Whether trust enforceable*

D *Land Law — Ownership — Claim for — Second appellant said lands registered in respondents' names were held on trust for him — Respondents argued they held them on trust for the family — Purchased out of family funds — Whether properties should be distributed equally between them*

E Two actions were brought against the respondents in the High Court. In the first action, all the appellants had sued the respondents. The second appellant is the elder brother to the second, third and fourth respondents, and only the second appellant sued the respondents in the second action. In both actions, the appellants claimed that all the shareholding of the second, third and fourth respondents in the first respondent company ('Lumayan') were held on trust for the second appellant as he had provided the purchase monies for them. The respondents counterclaimed against the appellants, and claimed that the shares and the properties in dispute were family assets out of a common fund of the family and as such, the properties were to be distributed equally between the parties. The respondents gave evidence that the purchase monies for the shares used by the second appellant were not the second appellant's monies but were monies belonging to the families of the second appellant, the second, third and fourth respondents and their father, ie it was the family's monies. The High Court dismissed the second appellant's claims and allowed the respondents' counterclaim, and ordered that the properties be distributed evenly among the second appellant, and the second, third and fourth respondents. The appellant appealed and the respondents cross-appealed.

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Held, dismissing the appeals and the cross-appeals:

I (1) (Per **Abdul Malek Ahmad JCA**) The trial judge had rightly found that the second appellant had agreed to the sale of the shares held by the first respondent of the first action. Both ss 132C(1)(b) and 132E of the Companies Act 1965 were not then in force as the sale and purchase agreement was entered into

on 29 January 1978. The trial judge had also correctly held that the second respondent was entitled to claim the difference between the amount he had expended and the amount he had taken from the family fund. Her conclusions tallied with the overall effect of the testimony recorded and it was not the appellate court's function to interfere with the trial judge's finding. As for the cross-appeals, there was no reason to vary the trial judge's orders as prayed for in the counterclaims (see pp 457B-F and 458B-C).

- (2) (Per **Ahmad Fairuz JCA**) It was clear from the judge's judgment that the conclusions she made were all based on the findings of fact by her. Evidence of the second appellant strengthened the inherent credibilities and probabilities of the respondents' version that the monies for the purchase of the shares came from the family's common fund and not from the second appellant. The judge also correctly held that the respondents had exercised their rights as majority shareholders when they removed the second appellant from the board of directors of the first appellant in both actions, and the evidence did support this finding.

Assuming that there was a trust created in favour of the second appellant, it should not be enforced as the second appellant had said that he had put the shares in his brothers' names to avoid paying income tax. As such, the trust was tainted with illegality and therefore was unenforceable. On the other hand, excerpts from the judgment of the trial judge showed clearly the existence of an implied trust in favour of the family. The dismissal of the claims of the appellants was proper and justified (see pp 462I and 463C-G).

[Bahasa Malaysia summary]

Dua tindakan telah dibawa terhadap penentang-penentang di Mahkamah Tinggi. Dalam tindakan pertama, kesemua perayu telah mendakwa penentang-penentang. Perayu kedua adalah abang penentang kedua, ketiga dan keempat, dan hanya perayu kedua mendakwa penentang-penentang dalam tindakan kedua. Dalam kedua-dua tindakan, perayu-perayu menuntut bahawa segala pegangan saham penentang kedua, ketiga dan keempat dalam syarikat penentang pertama ('Lumayan') dipegang atas amanah untuk perayu kedua kerana ia telah menyediakan wang belian untuk mereka. Penentang-penentang menuntut balas terhadap perayu-perayu, dan menuntut bahawa saham-saham dan hartanah yang dipertikaikan adalah aset keluarga dari tabung sepunya kepunyaan keluarga tersebut dan oleh yang demikian, hartanah tersebut hendaklah diagihkan sama rata di antara pihak-pihak. Penentang-penentang memberi keterangan bahawa wang belian untuk saham-saham yang digunakan oleh perayu kedua bukanlah wang perayu kedua tetapi wang yang dimiliki oleh keluarga-keluarga perayu kedua, penentang kedua, ketiga dan keempat dan ayah mereka, iaitu ia adalah wang keluarga.

- A** Mahkamah Tinggi menolak tuntutan perayu kedua dan membenarkan tuntutan balas penentang-penentang, dan memerintahkan bahawa hartanah tersebut diagihkan sama rata di antara perayu kedua, dan penentang kedua, ketiga dan keempat. Perayu membuat rayuan dan penentang-penentang membuat rayuan balas.
- B**

Diputuskan, menolak rayuan-rayuan dan rayuan-rayuan balas:

- C** (1) (Oleh **Abdul Malek Ahmad HMR**) Hakim perbicaraan telah dengan betulnya mendapati bahawa perayu kedua telah bersetuju kepada jualan saham-saham yang dipegang oleh penentang pertama dalam tindakan pertama. Kedua-dua ss 132C(1)(b) dan 132E Akta Syarikat 1965 tidak berkuatkuasa pada masa itu kerana perjanjian jual beli diikat pada 29 Januari 1978. Hakim perbicaraan juga telah memutuskan dengan betul bahawa penentang kedua berhak menuntut perbezaan di antara amaun yang telah dibelanjakannya dan amaun yang telah diambil daripada tabung keluarga. Kesimpulan beliau selaras dengan kesan keseluruhan testimoni yang dicatatkan dan ia bukan merupakan fungsi mahkamah rayuan untuk mengganggu keputusan hakim perbicaraan. Berkenaan dengan rayuan balas tersebut, tiada sebab untuk mengubah perintah hakim perbicaraan seperti yang dipohon dalam tuntutan balas (lihat ms 457B-F dan 458B-C).
- D**
- E** (2) (Oleh **Ahmad Fairuz HMR**) Adalah jelas daripada penghakiman hakim bahawa kesimpulan yang dibuat kesemuanya berdasarkan dapatan fakta oleh beliau. Keterangan perayu memperkukuhkan kebolehpercayaan dan kebarangkalian versi penentang-penentang bahawa wang untuk belian saham-saham berpunca daripada tabung sepunya keluarga dan bukannya daripada perayu kedua. Hakim juga telah betulnya memutuskan penentang-penentang telah melaksanakan hak mereka sebagai pemegang saham majoriti apabila mereka menyingkirkan perayu kedua daripada lembaga pengarah perayu pertama dalam kedua-dua tindakan, dan keterangan memang menyokong keputusan ini.
- F**
- G**

- H** Dengan beranggapan bahawa terdapat amanah yang diwujudkan memihak perayu kedua, ia tidak patut dikuatkuasakan kerana perayu kedua telah mengatakan bahawa ia telah meletakkan saham-saham atas nama saudaranya bagi mengelakkan pembayaran cukai pendapatan. Dengan itu, amanah itu dicemari kepenyalahan dan maka ia tidak boleh dikuatkuasakan. Sebaliknya, petikan daripada penghakiman hakim perbicaraan jelas menunjukkan kewujudan suatu amanah tersirat memihak keluarga tersebut. Penolakan tuntutan perayu-perayu adalah wajar dan berjustifikasi (lihat ms 462I dan 463C-G).]
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Notes

For cases on appeal on findings of fact, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 531–608.

For cases on ownership of shares, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 526–530.

For a case on claim for ownership of land, 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 2182.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (refd)

Howes v Platt (1905) 21 TLR 501 (refd)

Pettitt v Pettitt [1970] AC 777 (refd)

Suntoso Jacob v Kong Miao Ming [1986] 2 MLJ 170 (refd)

Yew Phaik Hoon v Quah Ooi Keat & Anor [1969] 1 MLJ 32 (refd)

Legislation referred to

Companies Act 1965 ss 131, 132C(1)(b), E

Appeal from: Civil Suit No D2–22–1547 of 1991 (High Court, Kuala Lumpur)

KS Narayanan (Colin Pereira, Anthony Leong and Saranjit Singh with him) (Riza Leong & Partners) for the appellants.

Robert Lazar (CW Lam with him) (Shearn Delamore & Co) for the first and second respondents.

DP Naban (KA Gan with him) (Hishamuddin Loong) for the third and fourth respondents.

Cur Adv Vult

11 November 1998

NH Chan JCA: I have had the advantage of reading the judgments in draft of my Lords Abdul Malek Ahmad and Ahmad Fairuz JCA and I also agree that both appeals and the cross-appeals be dismissed with costs.

11 November 1998

Abdul Malek Ahmad JCA: Despite the number of names in the headings of these two appeals, the principal characters are actually only Tneu Beh and his three brothers, Tiew Kun @ Tiew Boon Eu ('Boon Eu'), Tew Hon Liam @ Tiew Boon Beng ('Boon Beng') and Tew Tian Lam @ Tneu Boon Seng ('Boon Seng') against whom he with three others had sued in relation to the shares of Lumayan Plantation Sdn Bhd ('Lumayan') in Kuala Lumpur High Court Civil Suit No D2–22–1547–1991 and by himself, regarding shares in Tanjung Kelapa Sawit Sdn Bhd ('Tanjung') in Kuala Lumpur High Court Civil Suit D3–22–28–1992.

A The four brothers are the sons of Tew Cheng Kang ('Cheng Kang') who passed away in 1967 and Goh Tian who died in 1979. Cheng Kang took Goh Tian, Boon Eu, Boon Beng, Boon Seng and a daughter in 1946 to China, leaving 12 year old Tneu Beh behind with Cheng Kang's younger brother Tiew Kok. Two years later, Cheng Kang returned with a nephew Teck Lam to join Tiew Kok in the coffee and coconut business in Tanjung Sepat, Ulu Langat. Tneu Beh was employed by them.

B Goh Tian returned from China in 1955 with Boon Eu, Boon Beng and Boon Seng. Boon Beng and Boon Seng stopped schooling to join the family business while Boon Eu did not and later qualified as a civil engineer in Taiwan. That same year, Tneu Beh got married. The following year saw the end of the coffee and coconut business of Cheng Kang, Tiew Kok and Teck Lam and the start of the saga involving the four brothers.

C The learned trial judge had quite systematically marshalled the facts by dividing the sequence of events into three time periods, namely from 1956 to 1967, from 1968 to 1979 and from 1980 to 1991.

D The first period from 1956 to 1967 begins from the year the joint business of Cheng Kang, Tiew Kok and Teck Lam split up to the year Cheng Kang died. It was during this period that the properties listed in sch A to the counterclaims were acquired and registered in Tneu Beh's name except for the land in Batu.

E Tneu Beh maintains that all the lands registered either in his name or in the names of his immediate family members and his younger brothers are his, as in the case of his immediate family members, they had been purchased from out of his own funds and as regards his younger brothers, they had only held the lands in trust for him. Pertaining to the Tanjung and Lumayan shares registered in his brothers' names, Tneu Beh had sought a declaration that they held them as his nominees and the shares should be transferred to him as the beneficial owner.

F Quite naturally Boon Eu, Boon Beng and Boon Seng do not agree with Tneu Beh's contention and insist that although the lands and shares are registered in their names and in the name of Tneu Beh and his immediate family members, all of them held them as trustees for the family, and by virtue of the fact that the lands and the shares were acquired from a family fund, they should be equally distributed between the four brothers. In addition, Boon Eu claims a reimbursement of all monies he had lent to the family upon his graduation.

G It is pertinent to consider the testimony of Teck Lam who joined Cheng Kang and Tiew Kok in the joint business in 1948 when he came to this country. He said that following the split, the 25 acres of land were divided between the three of them to the exclusion of Tneu Beh. Cheng Kang got 10 acres, Tiew Kok 12½ acres and Teck Lam 2½ acres. It was also Teck Lam's evidence that Cheng Kang was very active throughout, managing the family business and finances together with Tneu Beh, Boon Beng and Boon Seng except for the last two years prior to his death when he became sickly, contrary to the testimony of Tneu Beh who said that the land was divided only between Teck Lam and him while his father Cheng Kang got nothing as he could not assist in the business, being plagued with ill health all along.

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The learned trial judge relied heavily on Teck Lam's version as she was of the view that he had nothing to gain from the claims and counterclaims. In consequence, she had her doubts on Tneu Beh's evidence as to how the shares were divided following the split. As for the setting up of Chop Eng Kwang which was formed after the split and dissolved in 1984, and which was dealing in coffee, coconuts, vegetables and fruits, despite being started in 1956, it was only registered on 20 May 1960 with Tneu Beh as the sole proprietor.

It was the finding of the learned trial judge that this did not entitle Tneu Beh to regard the business as his personal business as Cheng Kang was still alive and would be in control being the head of the family. Furthermore, Boon Beng and Boon Seng assisted in the business but were not paid salaries as their living expenses came from it. It is also not disputed that Boon Seng took over the sole proprietorship from Tneu Beh on 1 August 1972.

The other business was Sin Ho Seng which dealt in rubber. Tneu Beh maintained that he became a partner in 1963 with one Ng Soon Bee on his initial capital of RM5,000. Ng Soon Bee retired in 1964. Tneu Beh became the sole proprietor until 1977 when Sin Ho Seng became a limited company with him and Boon Seng holding 40 per cent of the shares each and one Lim Kwee Chan holding the remaining 20 per cent. Boon Beng, however, disputes Tneu Beh's testimony as regards the RM5,000 as he maintains that the money was given by Cheng Kang who left the management of the business to Tneu Beh, Boon Seng and to him.

At first, Cheng Kang and his family lived with Teck Lam but he and his four sons moved to No 376 Main Road, Tanjung Sepat in 1963. This house was a four unit shophouse which Tneu Beh claims belonged to him as he had bought the land on which the shophouse stands. Boon Eu, however, gave evidence that Cheng Kang constructed the shophouse but transferred the title of the land to Tneu Beh.

The learned trial judge preferred Boon Eu's testimony on this issue as the four entrances to the shophouse strongly indicated Cheng Kang's concern that his four sons and their families should live together under one roof. Moreover, Tneu Beh had only made a bare assertion with no specific particulars as to when the purchase was made, who the vendor was and what the actual purchase price was.

In 1974, another business was set up by Tneu Beh, Boon Beng and two others which was called Sin Ho Seng Kelapa Sawit dealing, naturally, with palm oil. This was dissolved the following year and converted to Tanjung with a capital of RM5 with five equal shareholders namely Boon Eu, Boon Beng, Boon Seng, Tiew Eng and Lim Hai Cheng.

We move now to the second period between 1968 to 1979. 1968 was the year following the year Cheng Kang died and 1979 was the year Goh Tian passed away. When Cheng Kang died, Tneu Beh obtained letters of administration in respect of his estate. Tneu Beh transferred to himself the only property which was house Lot B. He identified only three beneficiaries namely himself, his mother and Boon Seng, explaining that it was his

- A** mother's idea to exclude Boon Eu and Boon Beng as they did not speak the national language. However, he now agrees to include them for the purpose of dividing the property.

B For the third period between 1980 and 1991, Boon Eu had qualified as a civil engineer and was working in Singapore with a high income. Only after that did he take an interest in the family business especially after Tneu Beh spent more time in Thailand having taken a second wife there and having started Bangkok Oil and Fats Co Ltd. It was then that Boon Eu looked after Tneu Beh's first family and Boon Beng's and Boon Seng's families advancing his own funds for their educational needs both at home and abroad.

C In 1986, there was an attempt to distribute the family assets after paying Boon Eu for all his advances but this did not materialize. In 1991, Tneu Beh got five persons who were not family members to mediate in the distribution issue but this resulted in disagreement. It is pertinent to note that Tneu Beh denied the earlier family attempts but this contradicts his later attempts with the outsiders.

D As regards Tanjung, Lim Hai Cheng transferred his share to Tneu Beh pursuant to an agreement dated 1 September 1978, who apart from being director also became chairman. The original capital of RM5 was increased to RM140,005 in 1980 with Tiew Eng owning 20,000 shares and Tneu Beh, Boon Eu, Boon Beng and Boon Seng 30,000 shares each. The position was changed on 1 May 1981 when Tiew Eng transferred, in exchange for a piece of land, his 20,001 shares to Tneu Beh, making him the major shareholder with 50,002 shares.

E The shareholding position changed further on 12 August 1981 when Boon Eu, Boon Beng and Boon Seng were allotted 31,999 shares each while Tneu Beh got 63,998 shares making him owner of 114,000 shares representing 38 per cent of the paid up capital. Accordingly, the shareholding of each of his three younger brothers was 62,000 shares but with their combined 61.8 per cent shareholding of 186,000 shares, they removed Tneu Beh as chairman and director of Tanjung on 7 March 1991.

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G Tneu Beh's explanation was that it was he who provided the initial capital but had the shares registered in his brothers' names on trust for him as beneficial owner to avoid paying income tax. This explanation alone makes the claim unenforceable as the reason is illegal. The learned trial judge, however, did not accept this contention as Tanjung originated from Sin Ho Seng Kelapa Sawit and not from Tneu Beh. Apart from that, there was no other indication that Tneu Beh was actually paying high income tax at that relevant time. In fact, he had only joined Tanjung much later. There was also the evidence that there was this iron safe where all the family cash profits were kept.

H On this point, the learned trial judge said at pp 22 and 23 of her judgment as follows:

I It is this collective contributions of the four brothers that have earned the family the wealth, the distribution of which is now disputed. They are no doubt partners in so far as the family businesses are concerned. They were not

concerned with whom the properties were registered as there is no bickering amongst them until these proceedings commenced. A

Considering all the evidence in its entirety, it is my considered opinion that an implied trust exists on the facts of this case and that the registered owners of the various properties hold them in trust for the family.

Lumayan was incorporated on 14 December 1970. On 29 January 1978, Tneu Beh purchased 350,000 shares from six different shareholders of Lumayan for RM906,400 with him providing 49 per cent of the purchase price and the remaining 51 per cent provided by 10 friends of his. None of the shares were registered in his name but in the names of his three brothers and Tanjung. B

One of Tneu Beh's 10 partners, Gan Yong Chai sold his 16,000 shares in Lumayan to Boon Seng but Tneu Beh insisted that he paid for them on behalf of Boon Seng. Following this sale, Boon Eu, Boon Beng, Boon Seng and Tanjung held 51 per cent of the shares while the remaining nine friends of Tneu Beh held 49 per cent. However, all the 49 per cent was transferred to Tneu Beh and his three sons in 1982. C

Tneu Beh claims that Boon Eu's 52,000 shares, Boon Beng's 40,000 shares and Boon Seng's 56,000 shares in Lumayan are held by them as his nominees and demands a transfer to him of those shares as beneficial owner pursuant to cl 3 of the sale and purchase agreement which had made reference to the purchaser 'or his nominees'. D

The learned trial judge said that she would have readily inferred that the shares claimed by Tneu Beh was covered by the implied trust in the absence of cl 3. However, she pointed out the fact that the sale and purchase agreement was actually between Tneu Beh and his nine friends whereas Boon Eu, Boon Beng and Boon Seng were not even aware of the agreement. As such, she held that the implied trust overrides cl 3 of the sale and purchase agreement. She even held that since the evidence is scanty as regards the shares procured by Tneu Beh from his friends with properties owned by him, she was of the view that the purchase of the 49 per cent must have come from the family fund. E

On 28 September 1984, all the four brothers passed a resolution as directors of Tanjung approving the sale of 210,000 shares held by Tanjung in Lumayan at RM1.50 each. In another agreement four days earlier, Boon Seng had agreed to purchase the said shares. Boon Seng tendered a cheque of RM58,815.45 in August 1991 after deducting RM256,184.55 which was the amount owed to him by Tanjung. At the same time, Lumayan passed a resolution approving the transfer of the 210,000 shares from Boon Seng to Boon Eu. F

Tneu Beh now makes a claim for those shares on the grounds it was improperly transferred. His contention was that the shares should revert to Tanjung and then to him by virtue of cl 3 of the sale and purchase agreement. G

It was also his contention that the transfer did not comply with s 131 of the Companies Act 1965 ('the Act') which deals with the disclosure by a H

I

A director of his interests in any contract with the company. He maintains that Boon Seng did not disclose his interest in Tanjung when he signed the sale and purchase agreement. The learned trial judge held the said section had not been contravened as all the directors, namely all the four brothers, were aware of Boon Seng's interest at the relevant time.

B Further, the purpose of the sale was to pay off Tanjung's debts to Chop Eng Kwang whose sole proprietor was Boon Seng. That was why in August 1991, Boon Seng only paid the difference between the sale price and the amount owed to him by Tanjung.

C Tneu Beh also insists that the sale was not approved at an annual general meeting and Boon Seng had not complied with s 132C(1)(b) and 132E of the Act. Section 132C(1)(b) of the Act, which came into force on 1 February 1986 vide Act A616 and subsequently amended by Act A657 which came into force one year later, states that the directors shall not carry into effect any proposal or execute any transaction for the disposal of a substantive portion of the company's undertaking or property which would materially and adversely affect the performance or financial position of the company unless the proposition or transaction has been approved by the company in a general meeting. Section 132E of the Act, which came into force on 1 February 1987 vide Act A657 and subsequently amended by Act A836 which came into force on 10 September 1992, provides that all substantial property transactions involving directors must be approved by a resolution at the company's general meeting. The learned trial judge found this objection devoid of merit as Tneu Beh had agreed to this sale and in any case both the sections questioned were not then in force as the sale and purchase agreement was entered into on 29 January 1978.

E As for Boon Eu's claims, despite the absence of any account books, the learned trial judge, after carefully considering his testimony before her, was satisfied that Boon Eu was entitled to claim the RM912,870.45 being the difference between the amount he had expended and the amount he had taken from the family fund.

Having evaluated the evidence, the learned trial judge finally made the following orders:

- G**
- (a) that the claims be dismissed with costs;
 - (b) that the counterclaims be allowed with costs and that all the properties listed in schs A, B and C therein be distributed equally between Tneu Beh, Boon Eu, Boon Beng and Boon Seng. These properties include:
- H**
- (i) house Lot B that has been registered in Tneu Beh's name as the sole beneficiary of Cheng Kang's estate;
 - (ii) other properties or their value that had been sold by Boon Eu, Boon Beng and Boon Seng;
 - (iii) all the Tanjung and Lumayan shares, including those registered in the names of Tneu Beh and members of his immediate family;
- I**
- (iv) the 210,000 Lumayan shares registered in Tanjung's name; and

- (c) that RM912,870.45 be paid out to the family property to Boon Eu before the distribution is effected as in para (b) above. A

The learned trial judge had analysed, quite admirably I must add, the evidence correctly and had made the proper inferences on the facts before her. Her conclusions, to my mind, tallied with the overall effect of the testimony recorded and sitting as an appellate tribunal, I do not think it is our function to interfere with the learned trial judge's findings. Accordingly, we dismissed both the appeals with costs. As for the cross-appeals, we saw no reason to vary the learned trial judge's orders as prayed for in the counterclaims. They were also dismissed with costs. The deposits for the appeals are to go to the respondents to account of their taxed costs. B

At the time of delivery of the judgment and in view of our decision, we invited all counsel to give their views on the question of costs. Learned counsel for the appellants argued that each party ought to bear their own costs as both the appeals and the cross-appeals had been dismissed. Learned counsel for the third and fourth respondents felt that the appeals should be dismissed with half costs whereas for the cross-appeals there should be no order as to costs. We were, however, more inclined to agree with learned counsel for the first and second respondents that costs should be awarded the way we ordered as costs should follow the event and it did not mean that the costs would be the same for both the appeals and the cross-appeals as it was up to the taxing registrar to assess. Accordingly, we confirmed our order that the two appeals and the cross-appeals are dismissed with costs. C D E

13 November 1998

Ahmad Fairuz JCA: These are appeals and cross-appeals against a judgment of the Kuala Lumpur High Court dismissing the second appellant's claims and allowing the respondents' counterclaims. The High Court also ordered that the properties listed in schs A, B and C in the counterclaims together with certain other specified properties be distributed equally between the second appellant, the second, third and fourth respondents. It was further ordered that a sum of RM912,870.15 be paid out of the family property to the second respondent before effecting the distribution. F G

The appellants had commenced in the Kuala Lumpur High Court, two actions against the respondents. The second appellant is the elder brother to the second, third and fourth respondents. The other appellants in the first action (Kuala Lumpur High Court Civil Suit No D2-22-1547-1991) are the second appellant's children. Only the second appellant sued the respondents in the second action (Kuala Lumpur High Court Civil Suit No D3-22-28-1992). H

In both actions, the appellants claim that all the shareholdings of the second, third and fourth respondents in the first respondent company are held on trust for the second appellant as he (the second appellant) had provided the purchase monies for them. The second appellant also claims that he had been wrongfully removed as director of the first respondent company and seeks several consequential orders. I

A The respondents, on the other hand, claim that the properties in schs A, B and C of their counterclaims are family assets out of a common fund of the family and as such, the properties are to be distributed equally between the second appellant and the second, third and fourth respondents. The respondents also seek several consequential orders as detailed in their counterclaims.

B

The appeals

C In his submission before this court, learned counsel for the appellants emphasized that the appellants' claims are only on the shares in the first respondent company. The appellants contended that those shares belong to them although they were in the respondents' names. According to the appellants, the respondents held those shares on trust for them. In support of this contention, the appellants' counsel referred to cl 3 of the sale and purchase agreement between the second appellant and the vendors of the shares of the first respondent company (in the first action), ie Lumayan Plantation Sdn Bhd ('Lumayan'). Clause 3 reads:

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E Completion of the sale and purchase of the said shares shall take place on the 28 February 1978 ('the said completion date') when against delivery to the purchaser or his solicitors of deeds of transfer duly executed by the respective vendors in favour of the purchaser or his nominees in respect of the whole of the said shares accompanied by the share certificates relating thereto together with resignation of directors and other officers in the form of the drafts already prepared and initialled for the purposes of identification the purchaser shall pay to each of the vendors or their solicitors the amount of the consideration set out opposite his/her or its respective name in the fourth column of the first schedule hereto.

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G The appellants' counsel laid emphasis on the words '... purchaser or his nominee ...' appearing therein. In this connection, counsel adverted to *Lewin on Trusts* (16th Ed) by WJ Mowbray wherein at p 6 the author said: 'A bare or simple trustee, especially of shares in a limited company is often called a nominee. He is a mere name or 'dummy' for the true owner.' Counsel then pointed out that the second appellant had in his evidence said, in reference to the purchase of the Lumayan shares, '... I settled the purchase price in full. Part of the purchase price came from others whilst the other part was my own money ...'. Because the second appellant had provided the purchase monies — including for the purchase of Tanjung Kelapa Sawit Sdn Bhd's shares (the first respondent company in the second action) — the shares in the names of the respondents were therefore held in trust for the second appellant. In support of this contention, counsel referred to several authorities including that at footnote 1 of p 196 in *42 Halsbury's Laws of England* (4th Ed) which reads:

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I If the purchaser provides the money on his own account, and not by way of loan to the nominee, and the nominee is a stranger, there is prima facie a resulting trust to the purchaser: see *Dyer v Dyer* (1788) 2 Cox Eq Cas 92 at p 93; *Lynch v Clarkin* (1900) 1 IR 178; Gifts, Vol 20, paras 39 et seq; Trusts.

Learned counsel for the respondents, however, drew the attention of this court to the evidence which show that the purchase monies used by the

second appellant were not the second appellant's monies but were monies belonging to the families of the second appellant, the second, third and fourth respondents and their father ('the family').

On this issue of the purchase monies, the learned High Court judge has, in her judgment, traced the history of those monies. It was the learned judge's finding that the second appellant's and the second, third and fourth respondents' father returned from China in 1948. In the same year, the father joined Teck Lam ('DW2') and Tiew Kok in the business of trading and processing coffee and coconut in Tanjung Sepat, Ulu Langat. The second appellant worked for them. In 1956, the joint business of the father, Tiew Kok and Teck Lam was split up and this, according to the learned judge, 'saw the beginning of the father, Tneu Beh, Boon Beng and Boon Seng initially, and later on Boon Eu, accumulating assets through the formation of family businesses and that the income and profits derived from such businesses were channelled towards purchasing landed properties and shares which now form the subject matter of the dispute amongst the four brothers' (Tneu Beh, Boon Beng, Boon Seng and Boon Eu are respectively the second appellant, the third respondent, the fourth respondent and the second respondent). The learned judge further pointed out that the father and members of his immediate family lived together with Teck Lam at the beginning. In 1963, they moved to a four unit shophouse situated at No 376, Main Road, Tanjung Sepat and until 1990, the families of the second appellant and the second, third and fourth respondents 'lived as one family unit, cooking and eating from the same pots'. Moving on to Tanjung Kelapa Sawit Sdn Bhd (the first respondent company in the second action), the learned judge said: '... 1974 also saw the formation of another business concern under the style and name of Sin Ho Seng Kelapa Sawit and from its very name, it dealt in palm oil. It was a partnership firm and the partners were Tneu Beh, Boon Beng and two others. This partnership was dissolved in 1975 when it was converted into a company known as Tanjung Kelapa Sawit Sdn Bhd ('Tanjung'), and the assets of the partnership went to Tanjung.

The capital of Tanjung was then RM5, divided into 5 shares of RM1 each, and the original shareholders were:

- (1) Boon Beng;
- (2) Boon Seng;
- (3) Boon Eu;
- (4) Tiew Eng; and
- (5) Lim Hai Cheng.

Boon Beng, Boon Seng and Boon Eu were also the original directors of Tanjung but Tneu Beh was neither a shareholder nor a director then ...'. The learned judge found that the second appellant became a shareholder and chairman of Tanjung in 1978. His shareholdings increased substantially following two capitalization exercises. 'This', said the learned judge, 'does not support the reason why he had excluded himself initially

A from participating in the business of Tanjung. If indeed the three younger brothers were his trustees as Tneu Beh would like this court to believe, there is no reason why he should join Tanjung as a shareholder and director later. The fact that he did can only mean that Tanjung, like the other businesses run by the family, is no more different in that it is also another family business, and in 1978, when he became a shareholder, a director and chairman of Tanjung, he was already the head of the family by virtue of him being the eldest son of the family and he had to assert his position by getting himself involved in a company which he had founded. For these reasons, I do not consider that the shares now held by Boon Beng, Boon Seng and Boon Eu in Tanjung are held by them as trustees for Tneu Beh.' Further on in her judgement, the learned judge asked: 'As Tanjung's capital came from Sin Ho Seng Kelapa Sawit, where did the funds originate to establish that partnership firm, and for that matter, the other family businesses?' To this question the learned judge answered: 'In this respect, there is evidence to show that there was an iron safe which Tneu Beh admitted was purchased by him and kept in his parents' room. Although Tneu Beh was not asked why he purchased the iron safe, there is evidence from his three younger brothers that case profits earned from the family businesses were pooled into the iron safe and it was the money from the iron safe that financed the purchases of the family's investments. While it is true that there is no direct evidence as to the amount of money that was kept in the iron safe and the amount taken out, the practice of maintaining such a safe for such a purpose is not altogether strange, given the situation that what we are dealing here is a typical Chinese family, steeped in the tradition that they work and live together and during the lifetime of the father, the son looked to him as the head of the family and after his death, the mother took his place and after her death, the honour fell on the shoulders of the eldest son, Tneu Beh. Considering the relationship of the parties, the close family unit and that their lives are centred on the success of their family businesses and family life, I consider that there is ample evidence of the existence of a family fund and that it was this family fund that financed the purchases of the numerous assets and properties, the ownership of which is now being disputed.'

G As regards to the appellants' claim on the 210,000 shares of Tanjung Kelapa Sawit Sdn Bhd in Lumayan Plantations Sdn Bhd (the first respondent in the first action), the learned High Court judge said: 'Tanjung also holds shares in Lumayan and initially the number was 105,000 shares, but following a capitalization exercise, Tanjung's holdings rose to 210,000 shares in 1978. However, on 28 September 1984, the four brothers, in the capacities as directors of Tanjung, passed a resolution approving the sale of the 210,000 shares held by Tanjung in Lumayan at the book value of RM1.50 ...'. The learned judge then found that on 24 September 1985, an agreement ('D4') was signed between Tanjung and Boon Seng (the fourth respondent), whereby the fourth respondent agreed to purchase the 210,000 shares for a consideration of RM315,000. This sale was only completed in August 1991 when the fourth respondent tendered a cheque for RM58,815.45 after credit was given for the debt due from Tanjung to the family business of Chop Eng Kwang. The fourth respondent was then

the sole proprietor of Chop Eng Kwang which started doing business in 1956. Chop Eng Kwang however was only registered on 20 May 1960 and the second appellant was the registered sole proprietor. The third and fourth respondents, however, assisted the second appellant in the business. They were not paid salaries but their living expenses were taken care of by the business. On 1 August 1972, the fourth respondent became the sole proprietor of Chop Eng Kwang. In this connection, the learned judge also found that Tanjung's debt to Chop Eng Kwang amounted to RM256,184.55 as at 31 December 1990. Subtracting this sum from the purchase price of the 210,000 shares under D4 accounted for the sum specified in the cheque tendered by the fourth respondent to Tanjung in August 1991. It was also pointed out by the learned judge that Lumayan had, at about the same time, passed a resolution approving the transfer of the 210,000 shares from the fourth respondent to the second respondent.

In her judgment, the learned judge considered the second appellant's contention that the transfer of those shares is defective as s 131 of the Companies Act 1965 ('the Act') has been contravened. Section 131 deals with the disclosure by a director of any interests the director has in any contract with the company. On this contention, the learned judge opined: 'The duty to disclose under s 131 of the Act is to make all the directors aware of the interests which one or more directors may have in a contract entered into with the company. Under the circumstances of this case, I do not consider that s 131 has been contravened as all the directors were aware of Boon Seng's interest when they executed D3.' D3 is the resolution passed by the second appellant and the second, third and fourth respondents on 28 September 1984 (referred to above). Having held that s 131 had not been contravened and having accepted the respondents' evidence on the transfer of the 210,000 shares of Tanjung Kelapa Sawit Sdn Bhd in Lumayan Plantations Sdn Bhd, the learned judge said: '... considering my finding on there being an implied trust in this case, ... the 210,000 shares now formed part and parcel of the family property.'

It was contended that the abovementioned findings of the learned judge are not supported by evidence. I had therefore meticulously examined the evidence tendered before the High Court judge and I found that the evidence do support the learned judge's abovementioned findings. As such, I am not prepared to disturb the findings. For this, I am guided by the case of *Yew Phaik Hoon v Quah Ooi Keat & Anor* [1969] 1 MLJ 32, in which the Privy Council refused to disturb the finding of fact made by the learned trial judge. In that case, the learned trial judge found as a fact that the estate was held by YHE in trust for the plaintiff. The Privy Council held that that finding could not be disturbed unless supporting evidence was lacking.

It is also clear from the learned judge's judgment that the conclusions she made were all based on the findings of fact by her. In fact, a close scrutiny of the second appellant's evidence reveals and strengthens further the correctness of the learned judge's conclusions. In his evidence under cross-examination, the second appellant agreed that:

- A** (1) the respondents' families live with his (the second appellant's) families in the same house;
- (2) in 1955, the second appellant got married to a woman 'he was unhappy with'. This did not force the second appellant 'to withdraw from the family's business activities'. The money generated from the business was kept in a box in the house;
- B** (3) the partnership in Sin Ho Seng Kelapa Sawit was converted into a company known as Tanjung Kelapa Sawit Sdn Bhd and all the assets of the partnership went to Tanjung Kelapa Sawit Sdn Bhd; and
- (4) Tanjung Kelapa Sawit Sdn Bhd owed money to Chop Eng Kwang.

C These evidence of the second appellant strengthen the inherent credibilities and probabilities of the respondents' version that the monies for the purchase of the shares of Tanjung Kelapa Sawit Sdn Bhd came from the family's common fund and not from the second appellant.

D As to the claim of the second appellant that he was wrongfully removed as director of the first respondent company in both actions, the learned judge held that the respondents had exercised their rights as majority shareholders when they removed the second appellant. Again I am unable to disagree with the learned judge as the evidence do support the learned judge's finding.

E Assuming that there was a trust created in favour of the second appellant, I am of the view that this court should not give effect to and should not enforce the trust in the second appellant's favour. This is because in his evidence, the second appellant distinctly said: 'I put the shares in my brothers' names as I wanted to avoid paying income tax.' On the strength of the case of *Suntoso Jacob v Kong Miao Ming* [1986] 2 MLJ 170 which was followed by this court in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770, the trust which the second appellant contended existed is plainly tainted with illegality and therefore is unenforceable. Surely avoiding paying income tax cannot be legal.

G For the reasons stated above, I am of the view that the dismissal of the claims of the appellants is proper and justified. In fact, the abovementioned excerpts from the judgment of the learned judge show clearly the existence of an implied trust in favour of the family. Cases like *Pettitt v Pettitt* [1970] AC 777 and *Re Howes v Platt* (1905) 21 TLR 501 do support the propriety of this conclusion of the learned judge. The aforesaid excerpts also show that the learned judge's reasonings are impeccable.

H As regards the respondents' counterclaims, the judgment of the learned High Court judge shows clearly that the learned judge had based her decision on the same findings of fact highlighted above. Because of those findings of fact, the learned judge directed that the properties in schs A, B and C in the counterclaims be distributed equally between the second, third and fourth respondents and the second appellant. For the reasons mentioned earlier on as to why the learned judge's findings of fact should not be disturbed, the learned judge's conclusion in allowing the counterclaims should not accordingly be disturbed too.

I

Cross-appeals

As to the cross-appeal of the first and second respondent, I find that the learned High Court judge had considered the relevant documents before she concluded that the second respondent was entitled to be reimbursed for the advances he had made to the families of the second appellant and the third and fourth respondents. The sum of RM912,870.45 ordered to be paid to the second respondent from the family property is the correct amount and is supported by evidence. The second respondent himself admitted under cross-examination that he took RM374,722.37 from the family fund. As such, this sum had to be subtracted from the sum of RM1,287,592.82 advanced by the second respondent to the families of the second appellant, the third and fourth respondents. Consequently, prayers 1(a) and (b) of the cross-appeal ought to be dismissed. Prayer 1(c) of the cross-appeal of the first and second respondents and prayer 1(a) of the cross-appeal of the third and fourth respondents ought to be dismissed as the subject matter therein never appeared in their counterclaims. Prayers 1(d) to (i) of the cross-appeal of the first and second respondents and prayers 1(b) to (g) of the cross-appeal of the third and fourth respondents too ought to be dismissed as these prayers are in their counterclaims and the learned High Court judge had allowed them.

Conclusion

These appeals and cross-appeals, in my view, revolve around findings of fact by the learned judge. In this connection, Lord Shaw in *Clarke v Edinburgh Tramways Co* (1919) SC.35 at p 36 said:

In courts of justice in the ordinary case, things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question: am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

On this excerpt, Gopal Sri Ram JCA in *Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung* [1997] 2 MLJ 465 at p 470 said: 'I must confess my own inability to locate a clearer statement reflecting the duty of an appellate court in a case where findings of fact are asked to be reviewed.' Having asked myself the same question asked by Lord Shaw to himself, I am not satisfied in my own mind that the learned High Court judge was

A plainly wrong. Consequently, the appeals and cross-appeals are hereby dismissed with costs.

Appeals and cross-appeals dismissed.

Reported by Jafisah Jaafar

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